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SUMMARY

Clear Channel Broadcasting Licenses, Inc. ("CCBL"), the licensee of WXBB(FM) (formerly WVOA(FM)), Facility ID No. 22134, DeRuyter, New York, hereby files this petition for reconsideration (the "Petition") of the *Report and Order* in this docket released on September 21, 2001 (the "*Order*"). The *Order* fails to comport with Commission precedent and policy, and disserves the public interest by specifying a set of theoretical reference coordinates for an FM allotment to Granby, New York, that would block a publicly beneficial pending modification application for WXBB.

Put simply, the *Order* fails to apply the correct standard for resolving a conflict between a reallocation proposal and a modification application. Faced with such a conflict, the Commission does not simply pick one or the other of the proposals. Instead, the long-established policy of the Commission seeks to accommodate both the proposed reallocation and the timely filed modification application by specifying an alternate set of reference coordinates. And, because a modification application specifies a real transmitter site, long-established Commission policy is to protect the coordinates specified in the modification application by designating an alternate set of reference coordinates *for the reallocation proposal*.

Here, the *Order* did not attempt to designate such an alternate set of reference coordinates for Granby that would have protected the WXBB transmitter site, even though WXBB had identified such alternate reference coordinates (or a very minor – 4 kilometer – site restriction). Instead, the *Order* compared the Granby reallocation proposal and the WXBB modification application under the four allotment priorities that are used only to compare irreconcilably conflicting allotment proposals without even

mentioning the wealth of precedent directing the Commission to accommodate both proposals through alternate reference coordinates for the reallocation proposal.

Failure to reconsider the *Order* would:

- Contradict, without explanation, extensive precedent that directs the Allocations Branch to specify an alternate set of reference coordinates for a proposed change in an FM allotment if such an alternate set of reference coordinates (or a site restriction) would eliminate a conflict between the proposed reallocation and a timely modification application;
- Establish precedent which does not acknowledge critical Commission policies that favor protection of *actual* coordinates of a *real* transmitter site proposed in a modification application over the *theoretical* reference coordinates associated with a proposed FM allotment; and
- Prevent a prompt increase in service to the public by WXBB without reasoned decisionmaking.

Accordingly, CCBL respectfully requests that the Allocations Branch reconsider the *Order* by specifying an alternate set of reference coordinates for the change of community of Channel 288A from Oswego to Granby so that the currently pending modification application for WXBB may be granted at the site coordinates proposed in that application.

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of Section 73.202)	RM-9953
of the Commission's Rules)	
Table of Allotments)	MM Docket No. 00-169
For FM Broadcast Stations)	
(Oswego and Granby, NY))	

To: Chief, Allocations Branch

PETITION FOR RECONSIDERATION

Clear Channel Broadcasting Licenses, Inc. ("CCBL"), the licensee of WXBB(FM) (formerly WVOA(FM)), Facility ID No. 22134, DeRuyter, New York, hereby files this petition for reconsideration (the "Petition") of the *Report and Order* in this docket released on September 21, 2001 (the "*Order*"). ^{1/} The *Order* should be reconsidered as it conflicts with Commission precedent and policy, and is inconsistent with the public interest by specifying a set of theoretical reference coordinates for an FM allotment to Granby, New York, that would preclude a publicly beneficial modification application for WXBB.

Pending before the Commission is a timely filed application to modify WXBB's transmitter site and vastly improve WXBB's service to the public. However, because the WXBB modification application would conflict the proposed reference

^{1/} See *Oswego and Granby, New York*, Report & Order, MM Docket No. 00-169 (Allocations, released September 21, 2001) (the "*Order*"). Notice of this action was published in the Federal Register on October 9, 2001. See 66 Fed. Reg. 51322. Accordingly, this Petition is timely filed pursuant to Sections 1.4(b) and 1.429 of the Commission's Rules. Also, CCBL is simultaneously filing a Motion to Stay for the stay of the *Order* in order to protect its and the public interest while this matter is being resolved.

coordinates for the reallocation of Channel 288A from Oswego to Granby, New York, WXBB proposed an alternate set of reference coordinates (or a four-kilometer site restriction) for the proposed Granby reallocation as a timely counterproposal in the rulemaking proceeding. This alternate set of reference coordinates would enable both the rulemaking proponent to bring a first local aural service to Granby *and* WXBB to move promptly to increase the population it can serve.

Commission precedent plainly states that the correct standard for resolving a conflict between a reallocation proposal and a timely modification application is not to pick one or the other, but to accommodate both whenever possible by implementing an alternate set of reference coordinates for the reallocation proposal. The *Order* does not follow this long line of precedent. Instead, it rejects the WXBB counterproposal, and requires CCBL to amend the pending WXBB modification application or have it dismissed. In so doing, the *Order* not only fails to follow extensive precedent that directs the Allocations Branch to specify an alternate set of reference coordinates for a proposed change in an FM allotment if such an alternate set of reference coordinates (or a site restriction) would eliminate a conflict between the proposed reallocation and a timely modification application, but also fails to acknowledge that the *actual* coordinates of a *real* transmitter site proposed in a modification application deserve greater protection than the *theoretical* reference coordinates associated with a proposed FM allotment. Finally, the *Order* precludes a prompt increase in service to the public by WXBB without the reasoned decisionmaking necessary for proper agency action.

Accordingly, CCBL respectfully requests that the Allocations Branch reconsider the *Order* by specifying an alternate set of reference coordinates for the change of community of Channel 288A from Oswego to Granby so that the currently pending modification application for WXBB may be granted at the site coordinates proposed in that application. 2/

I. BACKGROUND

In April 2000, CCBL and Cram Communications, Inc. ("Cram") filed an application requesting Commission consent for CCBL to acquire WXBB from Cram (the "WXBB Assignment Application"). See FCC File No. BALH-20000414ABM. On the last day of May 2000, Galaxy Communications, L.P. ("Galaxy"), which is the licensee of ten radio stations in this region of central New York, 3/ filed a petition to deny the WXBB Assignment Application, which delayed grant of the WXBB Assignment Application until March 2001.

By then, however, Galaxy had filed a separate petition for rule making (the "Petition") to modify the FM Table of Allotments to change the community of license of one of its ten central New York stations -- WTKV(FM), Channel 288A -- from Oswego to Granby, New York, and to modify the license of WTKV accordingly (the "Initial Galaxy Proposal"). Six weeks later, the Allocations Branch issued a Notice of Proposed Rule Making requesting comment on the Initial Galaxy Proposal (the "Notice").

2/ See FCC File No. BPH-20001106ABG (the "WXBB Modification Application" or "Modification Application").

3/ See BIA Research, *Radio Market Report 2001*, at Metro 78 (showing Galaxy as owner of 10 radio stations in Syracuse radio market).

On November 6, 2000, pursuant to the Notice, both Cram -- as the licensee of WXBB -- and Galaxy timely filed comments (respectively, the "Cram Comments" and the "Galaxy Comments"). Also on November 6, 2000, Cram timely filed the WXBB Modification Application. The Cram Comments explained that, consistent with established Commission precedent, the public interest would be best served by the Commission approving both the Modification Application and a modified version of the Initial Galaxy Proposal, which would enable WTKV to bring a first local aural transmission service to Granby with either a very slight change to the theoretical reference coordinates proposed in the Petition or a very minor -- four kilometer -- site restriction (collectively with the Modification Application, the "Cram Proposal").

On November 21, 2000, both Cram and Galaxy filed reply comments (respectively, the "Cram Reply" and the "Galaxy Reply"). The Cram Reply detailed the overwhelming benefits of the Cram Proposal:

1. it would enable Galaxy: i) to bring the first local transmission service to Granby; ii) to increase the WTKV's net service population by more than 70,000 persons; and iii) to reduce an international short spacing; *and*
2. it would enable Cram: i) to move promptly to complete WXBB's proposed modification at a bona fide transmitter site; ii) to increase WXBB's net service population by nearly 200,000 persons; iii) to eliminate existing short-spacings to four other New York stations: WNGZ(FM), Montour Falls; WGKR(FM), Grand Gorge; WKPQ(FM), Hornell; and WMRV-FM, Endicott; and iv) to reduce mutual interference with WILQ(FM), Williamsport, Pennsylvania.

In its Reply, Galaxy refused to accept the Cram Proposal. Even though both proposals enabled an initial local aural transmission service to be brought to Granby, Galaxy nonetheless contended that the public interest benefits of its Initial Proposal outweighed those of the Cram Proposal. Galaxy also manufactured a series of vague alternatives (collectively, the "New Galaxy Proposals") that shared a single key

attribute: each would compel WXBB to modify its pending Modification Application to specify a different (and apparently hypothetical) transmitter site. ^{4/} In particular, Galaxy was willing to accept alternate reference coordinates, just not any that also would enable WXBB to use the bona fide transmitter site – with its reasonable site assurance and FAA clearance -- proposed in the Modification Application.

On July 2, 2001, the Allocations Branch issued a further public notice requesting additional reply comments relating to the Cram Proposal. Both Galaxy and CCBL, by now the owner of WXBB, filed comments (the “Galaxy Surreply” and the “CCBL Surreply,” respectively). As this was CCBL’s first chance to respond substantively as the owner of WXBB, CCBL adopted the Cram Proposal and again explained why the Commission should prefer the Cram Proposal – which, among its many public benefits, enabled *both* the proposed change of community to Granby *and* grant of the pending Modification Application. Moreover, as this was the first chance of any party to respond as a matter of right to the Galaxy Reply, CCBL also highlighted relevant Commission precedent – including the Commission’s policy of resolving conflicts between allotment changes and timely modification applications whenever possible as well as specific precedent in which the Allocations Branch has adopted a site restriction or alternate reference coordinates in order to enable an otherwise conflicting application to proceed. Finally, CCBL stressed a key difference between the Cram Proposal and any of the New Galaxy Proposals: only the Cram Proposal specifies an actual transmitter site for WXBB, and thus is the only proposal whose net service gains are not largely hypothetical. In contrast, Galaxy largely reiterated its prior

^{4/} Galaxy Reply at 6-7.

reply, again without setting forth any specific precedent supporting its demand to require WXBB to re-locate its transmitter site.

On September 21, 2001, the Allocations Branch released the *Order*. That *Order* cites no past cases in which the Allocations Branch had settled such a conflict between a pending community change and a timely modification application. And though the *Order* recognizes the CCBL Surreply as part of the proceeding, it ignores the content of that Surreply – including the specific Commission precedent cited therein in favor of the Cram Proposal and the many reasons to endorse the Cram Proposal over any of the various Galaxy proposals. Instead, the *Order* looks first (and only) to the Commission's criteria for resolving two or more irreconcilable re-allotment proposals. Based on this inapplicable standard, the *Order* adopts the reallocation proposal with one of the alternate set of reference coordinates first suggested in the Galaxy Reply and gives CCBL until December to amend its pending application to specify another set of "reference coordinates."

Because the *Order* is contrary to Commission precedent, policy and procedure, and is inconsistent with the public interest, CCBL hereby submits this Petition requesting its rescission or modification such that the WXBB Modification Application may be granted without amendment.

II. THE ORDER IS CONTRARY TO COMMISSION POLICY AND THE PUBLIC INTEREST AND MUST BE RECONSIDERED.

Reconsideration of an allotment change is warranted whenever the underlying decision involves "error of fact or law" or "facts or circumstances which raise substantial or material questions of fact which otherwise warrant Commission review of

its prior action." 5/ Because the *Order* failed to comply with a long series of relevant Commission precedent, policy and procedural requirements, as well as being contrary to the public interest, it must be reconsidered. 6/

A. FCC Precedent Dictates Adoption of the Cram Proposal.

1. *Commission Policy Requires Use of Alternate Reference Coordinates for an Allotment Proposal If Necessary to Resolve a Conflict with a Timely Modification Application.*

Nearly a decade ago, the Commission established that, in cases in which a proposed allotment change conflicts with a timely filed construction permit application, the Commission will do whatever it can to grant both requests. 7/ Under the policy expressly adopted in the *Conflicts* proceeding, the Commission will "eliminate conflicts between a rulemaking petition and a later-filed application where possible to do so without prejudice to the affected parties." 8/ Put simply, the Commission does not attempt to determine which of the competing proposals can hypothesize a greater number of speculative benefits *if there is any solution that would allow the allotment proposal and the application to proceed without actual and material prejudice to either.*

5/ *Winslow, Camp Verde, Mayer and Sun City West, Arizona*, Memorandum Opinion & Order, 2001 FCC Lexis 2665, MM Docket No. 99-246 at ¶ 4 (Allocations, rel. May 11, 2001) (citing Section 1.429 of the Commission's Rules).

6/ See, e.g., *Fair Bluff, North Carolina*, Memorandum Opinion & Order, 11 FCC Rcd 12662, 12666-12667 (¶¶ 13-17) (Policy & Rules, 1996) (granting reconsideration of decision that had rejected proposal necessary to modify existing station because that modification would have required site restriction on allotment for which no application had been granted).

7/ *Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments*, Report & Order, 7 FCC Rcd 4917 (1992), on reconsideration, 8 FCC Rcd 4743, 4745 n.12 (1993) ("*Conflicts Recon Order*"); see also CCBL Surreply at 5 & n. 7.

8/ See *id.*

The *Order* disregarded this threshold Commission policy. Galaxy never attempted to demonstrate any actual and material prejudice that would result from Cram and CCBL's proposed change to the *theoretical reference coordinates* of WTKV's proposed move to Granby. 9/ Nor could it do so.

First, such allotment reference coordinates are no more than a hypothetical and temporary means to protect a potential service area of a future radio station. A future applicant for an allotment can choose any transmitter site that complies with the Commission's Rules, regardless of the allotment's reference coordinates. And Commission precedent makes undeniably clear that a rulemaking proponent has no right to any particular set of reference coordinates for a proposed allotment change. 10/ Accordingly, any speculative claim of prejudice based on a change of such theoretical coordinates (and the even more speculative "predicted" gains and losses based on such coordinates) has no legal standing.

Second, a change in allotment reference coordinates during a rulemaking proceeding does not risk material delay to the implementation of the proposed allotment change. Galaxy cannot apply for any particular transmitter site for WTKV's move to Granby until after the *Order* takes effect. Thus, Galaxy will be on notice of the set of

9/ See, e.g., Galaxy Reply at 2-7 (focusing on comparative public interest benefits of various Galaxy proposals and Cram Proposal).

10/ The Allocations Branch has instituted site restrictions (or a different set of reference coordinates) in literally dozens, if not hundreds, of allocations proceedings in order to facilitate several potentially mutually exclusive proposals. See, e.g., *McCook, Alliance, Imperial, Nebraska, and Limon, Parker, Aspen, Avon, and Westcliffe, Colorado*, Report and Order, MM Docket No. 00-6 (Allocations, released April 27, 2001) (instituting site restriction to enable grant of pending application); *Roxton, Texas and Soper, Oklahoma*, Report & Order, 13 FCC Rcd 20992 (Allocations, 1998).

reference coordinates chosen for the Granby allotment well prior to the time in which Galaxy could file its application to modify WTKV.

Third, the reasonableness of the proposed reference coordinates (or site restriction) for Granby and Galaxy's own conduct in the rulemaking proceeding ensures that the Cram Proposal does not cause material prejudice. The alternate reference coordinates for WTKV identified by the Cram Proposal are in a technically feasible location well within Granby's geographic limits, a point that Galaxy has not even attempted to challenge. 11/ And Galaxy itself demonstrated that, in fact, it is willing to accept any number of other reference coordinates, including those ultimately adopted by the *Order*.

In contrast, the continued failure to adopt the Cram Proposal substantially prejudices -- and may completely preclude -- the WXBB Modification Application. The CCBL Surreply detailed how the change demanded by Galaxy in the coordinates proposed in that Application would force WXBB from its currently designated site where the station has both reasonable site assurance and FAA clearance, and for which the applicant already has confirmed the technical feasibility of its proposed operations. 12/ At worst, such a compelled move will forever block the publicly beneficial change proposed by WXBB. At best, the Modification Application necessarily would be delayed while CCBL locates another potential transmitter site for WXBB, a delay that is itself material prejudice of the very sort that the Commission said it would avoid if there were another possible non-prejudicial accommodation. Accordingly, the extremely minor

11/ See Cram Comments, Engineering Statement at Figure 2 (showing alternate site to be near Granby's geographical center and affording complete coverage of Granby).

12/ See CCBL Surreply at 7-8.

change – approximately four kilometers -- in Granby's theoretical reference coordinates proposed by Cram and CCBL should have been adopted on the basis of the Commission's established standard for resolving conflicts between allotment proposals and applications.

2. *Specific Commission Case Law Dictates Adoption of the Cram Proposal.*

An examination of relevant fact-specific precedent confirms that the Commission must reconsider the *Order*. Even before the *Conflicts* standard was adopted, the Allocations Branch had determined that it would specify an alternate set of reference coordinates in a rulemaking proceeding in order to protect a timely filed application to modify another station's transmitter site. ^{13/} In *Warrenton, Georgia*, the Allocations Branch recognized that to do otherwise – even though the alternate set of reference coordinates effectively imposed an 18-kilometer site restriction -- would unnecessarily cause the pending applicant to lose access to an existing tower site where FAA clearance and reasonable site assurance had been secured. ^{14/} Accordingly, the Allocations Branch decided that it would attempt “to accommodate applications for transmitter sites by modifying a rule making proposal to specify an alternate site.” ^{15/}

^{13/} See *Warrenton, Georgia*, Report & Order, 6 FCC Rcd 5174, 5174 (¶¶ 2-3) (Allocations, 1991) (adopting an alternate set of reference coordinates to enable applicant to modify its existing station).

^{14/} See *id.*

^{15/} See *Indiantown & Okeechobee, Florida*, 8 FCC Rcd 2218, 2217 (¶ 4) (Allocations, 1993) (explaining the principle adopted in *Warrenton, Georgia*).

The broad principle of mutual accommodation announced in the *Conflicts* proceeding follows directly from such precedent. In fact, the *Conflicts* proceeding strengthened this policy: the Commission principle announced in the *Conflicts* proceeding *affirmatively obligates* the Allocations Branch to use a set of non-prejudicial alternate reference coordinate if such coordinates would enable grant of both a reallocation proposal and a pending modification application.

Later cases confirm that the policy announced in the *Conflicts* proceeding requires use of alternate reference coordinates for a proposed allotment whenever possible to enable a timely filed Modification Application to be approved at its specified transmitter coordinates. For example, three years after the *Conflicts Recon Order*, the Allocations Branch faced a set of facts that are nearly identical to those of the instant case. ^{16/} In *Kerman*, EBE Communications Limited Partnership had timely filed a counterproposal that requested that the Commission adopt a site restriction of 11 kilometers (and a different channel) for a proposed allotment in order to enable grant of EBE's application to modify its station's existing facilities. ^{17/} Based on established Commission policy, the Allocations Branch adopted EBE's counterproposal, thereby protecting the site coordinates specified in EBE's application. ^{18/}

One year later, in *Weaverville, California*, the Allocations Branch likewise sought to use alternate reference coordinates as a means to resolve a conflict between an allotment's proposed reference coordinates and a later but timely filed permit

^{16/} See *Kerman, California*, 11 FCC Rcd at 2887-88. See also CCBL Surreply at 6 (explaining how *Kerman* directs adoption of the Cram Proposal).

^{17/} See *Kerman, California*, 11 FCC Rcd at 2887-88.

^{18/} See *id.*

application. ^{19/} Specifically, the Allocations Branch, on its own initiative, attempted to locate any set of alternate reference coordinates that would enable the rulemaking proponent to locate a transmitter site that could provide sufficient coverage to the proposed community of license without forcing a change in site of any of the conflicting permit applications. Even when it was unable to locate a feasible set of alternate coordinates (because of the established restrictions on land use in the area), the Allocations Branch adopted a solution that did not require any of the permit applications to adjust their proposed transmitter sites.

Here, the record in this proceeding adduced no reason why Galaxy would not be able to locate an appropriate transmitter site given the coordinates proposed in the Cram Proposal – which are a mere four kilometers from those Galaxy initially proposed and are located within Granby itself. In fact, Galaxy underscored its ability to use other reference coordinates when it proposed its own alternate set of reference coordinates in the Galaxy Reply. ^{20/} Accordingly, under *Warrenton*, *Kerman* and *Weaverville*, as well as under the general Commission principle announced in *Conflicts*, the *Order* must be modified to adopt the Cram Proposal.

3. *Neither the Order Nor Galaxy Cited Precedent That in Any Way Justifies Rejection of the Cram Proposal.*

^{19/} *Weaverville, California*, Report & Order, 12 FCC Rcd 2965, 2967 (¶ 3) (Allocations, 1997).

^{20/} That the *Order* adopted Galaxy's "alternative" set of coordinates also may violate Commission policy. Under *Winslow, Camp Verde, et al*, 2001 FCC Lexis 2665 (Allocations, rel. May 11, 2001), the Allocations Branch adopted a policy against allowing any party to propose "optional or alternative proposals" in a single rulemaking proceeding. That policy became effective on May 30, 2001, months prior to the adoption of the *Order*. Nonetheless, the *Order* adopted one of Galaxy's "alternate" reference coordinates because it allegedly demonstrated a projected net gain trivially larger than that demonstrated by the Cram Proposal.

Inexplicably, neither the *Order* nor Galaxy's pleadings in this matter even attempted to explain why such compelling precedent did not obligate adoption of the Cram Proposal. The *Order* cited the *Conflicts* proceeding, but flatly ignored the key principle established in that proceeding: that the proper resolution of a conflicting allotment proposal and a timely filed permit application is, whenever possible, to accommodate both without material prejudice to the rights of either. In fact, the *Order* did not even consider potential accommodations -- such as a site restriction, alternate set of reference coordinates or even an alternate channel for WTKV -- that could resolve the conflict without material prejudice. Instead, the Decision asserted, without citation, that the appropriate means of resolving a conflict between a reallocation proposal and a competing permit application is to compare the two proposals under the comparative priorities used for assessing competing allotment proposals. ^{21/} This the wrong standard. Likewise, the *Order* did not refer to any past cases in which a timely permit application conflicted with a rulemaking proposal -- i.e., cases in which the Commission actually applied the policy articulated in *Conflicts*, such as *Weaverville* and *Kerman*.

Galaxy did no better in its attempt to find precedent supportive of its thesis -- that the Commission should deem Galaxy's proposed move of WTKV to Granby and the WXBB Modification Application as an either-or proposition, rather than first determining if it could accommodate both. For this proposition, Galaxy cited an order that, by its own terms, did not attempt any reformulation of the Commission's

^{21/} See *Order* at 2 (¶ 2) ("In addition, in situations such as those presented in this case where a competing application must be considered, we compare the reallocation

substantive policy with regard to conflicts between rulemakings and applications. 22/ Rather, this *One-Step Upgrade Order*, which focused on changing FCC procedures for certain upgrades, simply summarized the procedures to be used in addressing certain *unresolvable* conflicts. Nowhere does the *One-Step Upgrade Order* suggest that it was eliminating the FCC policy -- announced just one month earlier -- of seeking a mutual accommodation first. 23/ And nowhere did Galaxy provide any evidence that the *One-Step Upgrade Order* in fact eliminated the common-sense policy of mutual accommodation.

Instead, Galaxy invoked the truism that the Allocations Branch prefers that "channels be allotted with the least site restrictions possible," 24/ and argued that it would thus be "inconsistent" for the Allocations Branch to issue a site restriction or modify a set of proposed reference coordinates in order to facilitate grant of a timely

proposal with the application. These comparative determinations are based upon the FM allotment priorities")

22/ See *Amendment of the Commission's Rules to Permit FM Channel and Class Modifications by Application*, 8 FCC Rcd 4735, 4739 (¶¶ 17-18) (1993) (the "*One-Step Upgrade Order*") ("briefly" restating the Commission's substantive policy, announced in the *Conflicts* proceeding and elsewhere, regarding conflicts between rulemakings and applications). Obviously, such a proceeding did not intend to re-write the principles of the *Conflicts* proceeding, and expressly relies on the principles established in that proceeding throughout.

23/ Compare *Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments, on reconsideration*, 8 FCC Rcd at 4745 n.12 (1993) with *Amendment of the Commission's Rules to Permit FM Channel and Class Modifications by Application*, 8 FCC Rcd at 4739. Even the titles of the two proceedings make abundantly clear which text governs this proceeding.

24/ See Galaxy Reply at 4.

filed construction Modification Application. 25/ But Galaxy did not explain how its claim could be reconciled with clear Commission precedent that has employed a site restriction (or alternate set of reference coordinates) to enable a timely filed pending construction permit application to be granted. 26/

In fact, even two of the few cases cited favorably by Galaxy demonstrate precisely that site restrictions (or alternate reference coordinates) are an entirely appropriate means of resolving conflicts. The decision in *Roxton, Texas, and Soper, Oklahoma*, concluded that a site restriction of 6.5 kilometers (larger than that requested in the Cram Proposal) should be applied to a proposed allotment in order to enable a pending modification application. 27/ And the real thrust of the decision in *Vacaville and Middleton, California*, was that an allotment proposal's theoretical reference coordinates should not be allowed to block a proposed service upgrade. 28/

Other Commission precedent has confirmed this reading of *Vacaville*. For example, in *Fair Bluff, North Carolina*, the Policy and Rules Division stated that the *Vacaville* decision "stands for the policy that the Commission will not deny another station's request to improve its facilities solely because" of a party's preference for a

25/ The one case that Galaxy cites in support of its claim that an application-driven site restriction violates Commission policy did not even involve a construction Modification Application. See *Vacaville and Middleton, California*, 4 FCC Rcd 8315 (Allocations, 1989), *recon. denied*, 6 FCC Rcd 143 (1991). That case involved competing *allotment* proposals – one for a class upgrade (which required a petition for rulemaking) and one for a new allotment.

26/ See, e.g., *Kerman, California*, Report and Order, 11 FCC Rcd 2887 (Allocations, 1996); *Huntingdon, Tennessee*, Report and Order, 8 FCC Rcd 3918 (Allocations, 1993).

27/ See 13 FCC Rcd at 20993 (¶ 4 n.5).

28/ *Vacaville and Middleton, California*, 4 FCC Rcd at 8316.

particular set of reference coordinates. ^{29/} In that case, a station licensee sought to modify the reference coordinates of a vacant allotment, for which applications were pending, in order to enable grant of its modification application. At first, its request was rejected. On reconsideration, however, the Division concluded that the public interest would not be served "by stymieing an existing station's efforts to improve its facilities" because of a particular set of preferred reference coordinates. Accordingly, *Fair Bluff* not only rejects Galaxy's attempt to broaden the *Vacaville* policy beyond its limited scope, but conclusively endorses the adoption of the Cram Proposal.

The overwhelming weight of such precedent demonstrates that both the *Order* and Galaxy ignored or misapplied established Commission policies relevant to the Cram Proposal. Accordingly, the *Order* should be reconsidered and modified to adopt that proposal without delay.

B. The *Order* Fails to Acknowledge the Policy Distinctions Between Modification Applications and Reallotment Proposals.

Beyond the long-standing precedent in favor of the Cram Proposal, the *Order* also does not pay due heed to the critical distinctions between pending reallotment proposals and pending applications for existing stations. At the most basic level, a reallotment proposal is a proposal for a change in the Commission's Rules, not an actual change in tangible facilities. A reallotment proposal thus not only takes longer to deliver any actual public interest benefits, but also requires far less concrete preparation and is processed under different rules and procedures than a modification application.

^{29/} *Fair Bluff, North Carolina*, 11 FCC Rcd 12662, 12667 (¶ 15) (Policy & Rules, 1996).

Specifically, at the time of filing, a reallocation proposal requires only the name of a proposed new community, a set of reference coordinates from which a “maximum” class facility can project 70 dBu coverage of the proposed community, and basic information about that community and projected coverage area. It does not require any other federal government approval, any other local government approval, any actual construction site, any plans for facilities or any private agreements to obtain or construct such facilities. And it proposes only a set of theoretical reference coordinates, which need to be nothing more than a temporary placeholder, an arbitrary point that bears no fixed relation to the ultimate transmitter site. In contrast, a modification application requires that the applicant, at the time of filing, has an actual transmitter site and specified parameters (and accompanying technical information) for the actual operations proposed.

Likewise, the rules and procedures governing the two types of proposals are distinct. For instance, a modification application, as a concrete and specific change, uniformly has its actual contour protected, while a reallocation proposal's protection is based only a projected contour based on a theoretical set of reference coordinates. And, when faced with a reallocation proposal that conflicts with a timely filed modification application, the Commission does not simply compare the two proposals, but first attempts to resolve the conflict without prejudice to either. When the conflict can be resolved by a change in coordinates, it is the theoretical reallocation reference coordinates that are changed, not the concrete transmitter site coordinates specified in the modification application. 30/

30/ See, e.g., *supra* notes 14, 15 & 18.

The *Order* ignored such basic principles. First, the Decision, without explanation, immediately compared the Galaxy and Cram Proposals under the Commission's four reallocation priorities when a simple – and minor – site restriction would have made such a comparison unnecessary. ^{31/} Second, the *Order* made other references that implied that the WXBB Modification Application was but another competing reallocation proposal. For example, it suggested that the Modification Application had proposed mere "reference coordinates," as opposed to having proposed (and made specific preparations for) an actual, bona fide transmitter site. ^{32/} Collectively, such errors underscore that the *Order* failed to apply the policies relevant to this matter and requires reconsideration.

C. The Public Interest Supports Adoption of Cram Proposal.

Finally, the *Order* must be reconsidered because to do otherwise would be unfair to the public. Both proposals would enable Granby to receive its first local transmission service, both would reduce an international short-spacing, and both would increase substantially the total number of persons served. However, only the Cram Proposal would enable WXBB to eliminate without unnecessary delay four existing short-spacings between WXBB and other New York radio stations. Only the Cram

^{31/} See *Order* at 3 (¶ 6). And even when it made that comparison, the *Order* erred. First, the *Order* compared only the Modification Application with the Galaxy Proposal, and completely neglected the critical fact that the Cram Proposal also would enable WTKV to bring a first local transmission service to Granby. Second, the *Order* appeared to treat as fact Galaxy's projections of net service gains based on an alternate theoretical transmitter site for WXBB. However, Galaxy's projections must be heavily discounted as they 1) rely on the significant assumption that such an alternate transmitter site actually exists; and 2) appear to have used a methodology that CCBL cannot replicate. See CCBL Surreply at 6-10.

^{32/} See *Order* at 3 (¶ 7) (referring to the Modification Application's "reference coordinates").

Proposal would enable WXBB promptly to reduce mutual interference with WILQ(FM), Williamsport, Pennsylvania. And – most significantly – only the Cram Proposal would promptly enable WXBB(FM) to increase its net service to nearly 200,000 persons. 33/ Adoption of any of the Galaxy proposals would make all of these concrete public service improvements contingent on CCBL and WXBB being able to locate a new *actual* transmitter site that complies with the Granby reference coordinates *and* that would result in the service gains imagined by Galaxy. Accordingly, only the Cram Proposal can likely ensure that all the above public interests benefits will ever be accomplished.

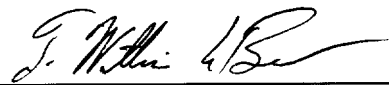
33/ That reconsideration also will enable additional review of the relevant factors in this matter and more reasoned decisionmaking under established Commission precedent is but another public interest benefit. See, e.g., *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 US 402, 416 (1971) (court must determine whether agency's decision was based on consideration of all relevant factors).

CONCLUSION

In light of the substantial public interest benefits of the Cram Proposal and the weight of relevant Commission precedent, CCBL hereby urges the Commission to adopt reference coordinates of 43° 18' 26" N.L. and 76° 27' 23" W.L. (or, alternatively a site restriction on the allotment that accomplishes the same result) for the allotment of channel 288A to Granby, New York, so as to enable provision of a first aural transmission service to Granby *and* prompt processing and grant of the WXBB Modification Application without amendment to that application's proposed transmitter site.

Respectfully submitted,

**CLEAR CHANNEL BROADCASTING
LICENSES, INC.**

By: 
Marissa G. Repp
F. William LeBeau

Hogan & Hartson, LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5600

Its Attorneys

October 22, 2001

CERTIFICATE OF SERVICE

I, Charlene Jones, hereby certify that on this 22nd day of October, 2001, a copy of the foregoing Petition was sent by first-class mail, postage prepaid, to:

Roy J. Stewart, Chief*
Mass Media Bureau
Federal Communications Commission
445 – 12th Street, S.W.
Room 2-C337
Washington, DC 20554

Robert H. Ratcliffe, Deputy Chief (Operations)*
Mass Media Bureau
Federal Communications Commission
445 – 12th Street, S.W.
Room 2C334
Washington, DC 20554

Mary Beth Murphy, Chief*
Policy and Rules Division
Federal Communications Commission
445 – 12th Street, S.W.
Room 2C360
Washington, DC 20554

Peter H. Doyle, Chief*
Audio Services Division
Federal Communications Commission
445 – 12th Street, S.W.
Room 2A320
Washington, DC 20554

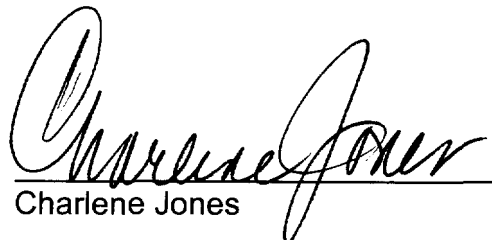
John A. Karousos, Chief*
Allocations Branch
Policy and Rules Division
Federal Communications Commission
445 – 12th Street, S.W.
Room 3A320
Washington, DC 20554

Robert Hayne, Senior Attorney*
Allocations Branch
Policy and Rules Division
Federal Communications Commission
445 – 12th Street, S.W.,
Room 3A320
Washington, DC 20554

R. Barthen Gorman*
Allocations Branch
Policy and Rules Division
Federal Communications Commission
445 – 12th Street, S.W.
Room 3A320
Washington, DC 20554

Sally A. Buckman
H. Anthony Lehv
Janet Y. Shih
Leventhal, Senter & Lerman P.L.L.C.
2000 K Street, N.W., Suite 600
Washington, DC 20006-1809

James R. Cooke
Harris, Beach & Wilcox L.L.P.
1776 K Street, N.W.
Suite 300
Washington, D.C. 20006



Charlene Jones

*By Hand Delivery